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Situation of human rights and fundamental freedoms of indigenous people

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, submitted in accordance with Human Rights Council resolution 12/13.

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Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people

Summary

The present report is submitted pursuant to Human Rights Council resolution 12/13. The report provides an overview of the activities carried out by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people between July 2009 and July 2010. In particular, it describes the Special Rapporteur's coordination with United Nations and regional human rights mechanisms and outlines initiatives undertaken within four interrelated spheres of activity: promoting good practices, thematic studies, country reports and cases of alleged human rights violations.

The report provides a brief discussion of three key issues that the Special Rapporteur has addressed during the past year, namely the right of indigenous peoples to development with culture and identity, the right of indigenous peoples to participation and the obligation of States to implement the United Nations Declaration on the Rights of Indigenous Peoples. These observations are intended as a complement to the work undertaken by the Permanent Forum and the Expert Mechanism on these important issues. The report also offers a number of conclusions and recommendations on the basis of the Special Rapporteur's examination of the substantive issues discussed in the report.

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I. Introduction

1. The present report is the second submitted to the General Assembly by the current Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. The mandate of the Special Rapporteur was originally established by the Commission on Human Rights in 2001 and was renewed by the Human Rights Council in its resolution 6/12 of 28 September 2007.

2. The present report provides an overview of the activities carried out by the Special Rapporteur since he submitted his first report to the General Assembly (A/64/338). In particular, it describes the Special Rapporteur's coordination with United Nations and regional human rights mechanisms and outlines initiatives undertaken within four interrelated spheres of activity: promoting good practices, thematic studies, country reports and cases of alleged human rights violations. These activities are carried out within the framework of the Special Rapporteur's mandate to monitor the human rights conditions of indigenous peoples around the world and to promote steps to improve those conditions in line with relevant international standards.

3. The report also provides a brief discussion of three key issues that the Special Rapporteur has addressed during the past year, namely the right of indigenous peoples to development with culture and identity, the right of indigenous peoples to participation and the obligation of States to implement the United Nations Declaration on the Rights of Indigenous Peoples. These observations were originally presented as part of statements made by the Special Rapporteur during the ninth session of the United Nations Permanent Forum on Indigenous Issues in April 2010 and the third session of the Expert Mechanism on the Rights of Indigenous Peoples in July 2010. They are intended as a complement to the work undertaken by the Permanent Forum and the Expert Mechanism on these important issues.

4. The Special Rapporteur is grateful for the support provided by the staff at the Office of the United Nations High Commissioner for Human Rights (OHCHR). He would also like to thank staff and affiliated researchers of the Indigenous Peoples Law and Policy Program at the University of Arizona for their continued assistance with all aspects of his work. Finally, the Special Rapporteur would like to thank the many indigenous peoples, Governments, United Nations bodies and agencies, non-governmental organizations and others that have cooperated with him in his work.

II. Summary of activities

A. Coordination with other mechanisms

5. During the second year of his mandate, the Special Rapporteur has continued his commitment to work in cooperation with other mechanisms within the United Nations system with a mandate specific to indigenous peoples, in particular the United Nations Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples. This coordination is in accordance with Human Rights Council resolution 6/12, in which the Council specified close cooperation with the Permanent Forum on Indigenous Issues and participation in its

annual session as part of the mandate of the Special Rapporteur; and resolution 6/36, in which the Council decided that the Expert Mechanism should invite the Special Rapporteur to its annual session in order to increase cooperation and avoid duplication of work.

6. In January 2010, the Special Rapporteur, together with representatives of the Permanent Forum and the Expert Mechanism, met in New York as part of this ongoing coordination and cooperation. At that meeting, the experts exchanged information about their respective agendas and discussed ways to channel the various activities carried out under each of their mandates, in order to increase their effectiveness. Additionally, in January 2010, the Special Rapporteur participated in a regional consultation in Thailand organized by the Asia Indigenous Peoples Pact, which members of the Expert Mechanism also attended. During the conference, the Special Rapporteur offered observations on the right of indigenous peoples to participation in decision-making, which is the subject of the Expert Mechanism's annual thematic study. The Special Rapporteur's inputs on this subject are detailed in section IV of the present report.

7. An important result of the coordination between the mechanisms has been the parallel meetings held during the sessions of the Permanent Forum and the Expert Mechanism. During these parallel meetings, the Special Rapporteur provides an opportunity for representatives of indigenous peoples and organizations to present information about specific situations of allegations of human rights violations. The Special Rapporteur held parallel meetings during the ninth session of the Permanent Forum in April 2010 and during the third session of the Expert Mechanism in July 2010. During these sessions, the Special Rapporteur also met with representatives of various States and United Nations agencies to discuss opportunities for collaboration and specific cases concerning indigenous peoples.

8. During the past year, the Special Rapporteur has also sought to coordinate with other human rights bodies within the United Nations system. In this connection, the Special Rapporteur attended conferences in Trinidad and Tobago in December 2009 and in Thailand in December 2009 and January 2010, organized by the Office of the High Commissioner for Human Rights and the United Nations Development Programme. At the regional level, the Special Rapporteur has participated in two activities with the Inter-American Commission on Human Rights. In March 2010, he met with members of the Commission on methods of coordination and cooperation, and in June 2010 he co-organized and led a conference with the Commission that trained indigenous leaders from North America in international human rights mechanisms.

B. Areas of work

9. Throughout the second year of his mandate, the Special Rapporteur has continued to develop and refine his working methods and to engage in a constructive dialogue with Governments, indigenous peoples, non-governmental organizations, United Nations agencies and other stakeholders, in order to address issues brought to his attention concerning the human rights situation of indigenous peoples throughout the world. As in the previous year, the Special Rapporteur's activities have been carried out within four principal areas: promoting good

practices, thematic studies, country reports and allegations of human rights violations.

1. Promotion of good practices

10. The Special Rapporteur has continued to promote legal, administrative and policy reforms at the national level to advance implementation of the rights enshrined in the United Nations Declaration on the Rights of Indigenous Peoples and other relevant international instruments, in accordance with Human Rights Council resolution 6/12.

11. This work has occasionally been performed at the request of individual Governments seeking technical advice in relation to legal and constitutional reforms concerning indigenous peoples' rights. For example, in December 2009, the Special Rapporteur visited Ecuador at the request of the Government to provide technical assistance in developing a new law aimed at coordination between indigenous justice systems and the State justice system. During the visit, the Special Rapporteur also reviewed the status of Ecuador's implementation of its Constitution of 2008, which contains several provisions recognizing the rights of indigenous peoples.

12. Also among the Special Rapporteur's activities to promote good practices is engagement with those States that did not originally vote in favour of adoption of the Declaration on the Rights of Indigenous Peoples in 2007. The Special Rapporteur is pleased to note that the Government of New Zealand officially declared its support for the Declaration during the ninth session of the Permanent Forum in April 2010. This statement of support followed Australia's formal endorsement of the Declaration in 2009. The Special Rapporteur has taken steps to engage with both these countries regarding the Declaration, during his visits to Australia and New Zealand in August 2009 and July 2010, respectively.

13. Additionally, Canada and the United States of America have declared that they are reviewing their positions on the Declaration. It is hoped these review processes will soon lead to similar expressions of endorsement, making opposition to the Declaration a thing of the past. The Special Rapporteur has emphasized to the United States and Canada that any formal statement should be made in a manner fully consistent with the Declaration's spirit and objectives.

14. On 24 and 25 May 2010, the Special Rapporteur participated in a seminar on multiculturalism and the oil and gas industry in Latin America and the Caribbean held in Cartagena, Colombia, organized by the Regional Association of Oil and Natural Gas Companies in Latin America and the Caribbean. The seminar provided an opportunity for the Special Rapporteur to dialogue with representatives of oil and gas companies, as well as with academics and members of civil society, on the obligations of private companies to respect international standards regarding indigenous peoples' rights.

15. Finally, in July 2010, the Special Rapporteur provided technical assistance for the process of developing a consultation law concerning indigenous peoples, which is currently under way in Colombia. The Special Rapporteur's input is part of an initiative launched by OHCHR, at the request of the Advisory Group of the Ministry of Interior and Justice of Colombia, to promote a participatory process for the development of a regulation on the State's duty to consult with indigenous peoples and Afro-Colombian communities.

2. Thematic studies

16. As the Special Rapporteur has stated in the past, given the specific mandate of the Expert Mechanism on the Rights of Indigenous Peoples to provide thematic expertise and recommendations to the Human Rights Council on issues affecting indigenous peoples, the Special Rapporteur sees his work carrying out thematic studies as secondary to other work under his mandate. Furthermore, the Special Rapporteur has endeavoured to engage in thematic research in ways that are complementary to and not duplicative of the work of the Expert Mechanism. In this connection, the Special Rapporteur has provided input to the Expert Mechanism for its current study on the right of indigenous peoples to participation in decision-making, which is discussed in more detail in section IV below.

17. However, the Special Rapporteur has also explored thematic issues in his annual reports to the Human Rights Council, including measures for operationalization of the United Nations Declaration on the Rights of Indigenous Peoples (A/HRC/9/9), the duty of States to consult with indigenous peoples (A/HRC/12/34) and the obligations of private companies to respect the rights of indigenous peoples when carrying out activities that affect them (A/HRC/15/37). As part of his examination of private company responsibility, about which he reported in his third annual report to the Council, the Special Rapporteur attended a meeting of experts in Sitges, Spain, organized by the UNESCO Centre of Catalunya and Kreddha (the International Peace Council for States, Peoples and Minorities), which examined methods to resolve the conflicts that often result from natural resource extraction activities on indigenous lands.

3. Country reports

18. The Special Rapporteur has continued to report on the overall situations of indigenous peoples in specific countries. The reporting process includes visits to the countries concerned, during which the Special Rapporteur meets with Government representatives, indigenous communities and other stakeholders. The country reports are intended to provide observations and recommendations to identify areas of concern and improve the conditions of indigenous peoples' human rights, as well as to strengthen good practices where these exist. Since his last report to the General Assembly, the Special Rapporteur has visited the Russian Federation, the Sápmi region (the traditional homeland of the Saami people spanning Norway, Sweden, Finland and parts of the Russian Federation) and New Zealand to report on the situations of indigenous peoples in these places.

4. Allegations of human rights violations

19. Regarding the fourth area of work, the Special Rapporteur has continued to concentrate his efforts on responding to specific allegations of human rights violations under the terms of Human Rights Council resolution 6/12, in which the Council mandated the Special Rapporteur to receive and exchange information from all relevant sources, including Governments, indigenous peoples and their communities and organizations, on alleged violations of the human rights and fundamental freedoms of indigenous peoples.

20. As in previous years, complaints received by the Special Rapporteur have related to common issues that affect indigenous peoples throughout the world, including the denial of the rights of indigenous peoples to their lands, territories and

natural resources; violations of the right to consultation and to free, prior and informed consent, especially in regard to natural resource extraction or the eviction of indigenous communities; threats or violence against indigenous individuals and communities, including human rights defenders; issues related to the recognition of indigenous justice systems; and the situation of indigenous peoples in isolation.

21. In several cases, particularly in relation to specific situations in Argentina, Cambodia, Canada, Chile, India, Kenya, Panama, Paraguay, Peru, Uganda and the United Republic of Tanzania, the Special Rapporteur has produced a series of observations and recommendations on actions that States can take to address the situations involved. These observations and recommendations are based on information that the Special Rapporteur has received from indigenous peoples and other stakeholders, as well as on the responses provided by States concerned and on research conducted by the Special Rapporteur. The Special Rapporteur's goal is to identify measures to address the issues in a way that promotes a spirit of cooperation between the State and the indigenous peoples concerned. The Special Rapporteur will continue to engage with States about these specific situations, and he hopes that the dialogue carried out to date has been useful both for the Governments concerned and for the indigenous peoples involved in these situations.

22. As in the previous period, the Special Rapporteur carried out visits to countries as part of his examination of specific situations. In June 2010, the Special Rapporteur visited Guatemala to discuss the implementation of the principles of consultation with indigenous peoples in the country, particularly in relation to extractive industries, with a special focus on the situation of indigenous peoples affected by the Marlin mine in the municipalities of Sipacapa and San Miguel Ixtuhuacán. He has also investigated allegations of specific cases of violations of human rights as part of his country visits and issued specific reports on those issues that he felt warranted a separate analysis. This was the case with his examination of the Northern Territory Emergency Response legislation in Australia.

23. The Special Rapporteur would like to thank those States that have replied to his communications; these responses have contributed greatly to building a positive dialogue between Governments, indigenous peoples and other actors. He would also like to urge those States that have not submitted responses to do so.

III. Development with identity and culture

24. The theme of the ninth session of the Permanent Forum was indigenous peoples' development with culture and identity, and during his annual presentation to the Permanent Forum, the Special Rapporteur offered the following observations on this important issue, in light of his work and experiences carrying out his mandate.

25. The right to development is a right of all peoples, including indigenous peoples. The Declaration on the Right to Development (General Assembly resolution 41/128 of 4 December 1986) affirms in its article 1 that "development is an inalienable human right" of "every human person and all peoples". While indigenous peoples have the right to develop in common with the broader communities and societies in which they live, there are often particular concerns relating to indigenous peoples that must at all times be taken into account with regard to development initiatives that affect them. These concerns stem from the

extreme disadvantages that indigenous peoples have typically faced across a range of social and economic indicators: the dispossession of lands and natural resources; their historical exclusion from State decision-making; and their aspirations to maintain and transmit to future generations their distinct identities and cultures.

A. Economic and infrastructure development projects that affect indigenous peoples

26. The Special Rapporteur sees two broad areas of concern that can be identified when considering development programmes affecting indigenous peoples. The first relates to policies and initiatives aimed at the development of the economy or infrastructure of the State generally and that are said to benefit the people of the State as a whole, but that have negative effects on indigenous peoples. These include development programmes involving the extraction of natural resources and mega-projects such as the construction of dams and transportation facilities on indigenous peoples' territories.

27. The problems arising from such development projects affecting indigenous peoples are present in a wide range of situations that the Special Rapporteur regularly encounters in connection with his activities of monitoring and responding to situations of concern to indigenous peoples around the world. These problems are often related to the absence of any adequate mechanisms of participation of indigenous peoples in the design and implementation of the development initiatives, the absence of adequate mitigation measures that take into account indigenous environmental and cultural concerns, the failure to recognize indigenous property rights in lands and resources and the absence of equitable sharing in the benefits of the development projects. In this regard, article 32 of the Declaration, with its call for the free and informed consent of indigenous peoples prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources, provides an important template for avoiding these problems in the development context.[1]

28. However, at the same time, article 32 affirms that "indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources". Thus, the Declaration's guarantees under article 32 are aimed not only at avoiding the harm to indigenous peoples that might result when development projects are carried out without their consent, but also at advancing indigenous peoples' own development interests along with those of the larger society, with the objective that indigenous peoples genuinely influence decision-making regarding the development of the countries in which they live.

[1] Similarly, the Inter-American Court of Human Rights has held in a case involving the Saramaka people of Suriname that "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions", *Saramaka v. Suriname*, judgment of 28 November 2007, para. 134.

B. Development projects aimed specifically at benefiting indigenous peoples

29. A second area of concern has to do with those development initiatives by States, often pursued with the backing of international actors, which are targeted specifically at indigenous peoples and their social and economic conditions. Many initiatives by States are aimed at the important objective of reducing the disadvantage that indigenous peoples experience in social and economic spheres. In his various reports assessing the human rights situations of indigenous peoples in various countries, the Special Rapporteur has provided specific details of examples of such Government policies and programmes that are targeted at key issues associated with indigenous peoples' development, including those related to indigenous health, education and poverty reduction.

30. Despite many positive advancements, the Special Rapporteur has observed the need for States to incorporate into programmes of this type a more integrated approach to addressing the development of indigenous peoples, one that aims not just to secure for them their social and economic well-being, but in doing so to advance their self-determination and their rights to maintain their distinct cultural identities, languages and connections with their traditional lands. In this regard, article 23 of the Declaration states that "indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions."

C. Enhancing indigenous self-determination in the development process

31. Self-determination in the development process is a matter of basic human dignity, for indigenous peoples as for all others. Enhancing indigenous self-determination has also been shown to be conducive to successful practical outcomes, and indigenous people who make their own decisions about development have been shown to consistently fare better than indigenous people who do not. In this connection, it is imperative that States and international actors seek to decidedly fold into development programmes the goal of increasing indigenous self-determination and control over development programmes.

32. As experience shows, advancing indigenous self-determination requires a practical orientation around specific objectives. A number of specific objectives must thus be pursued to enhance indigenous self-determination in the development process. Among these is the objective of enhancing indigenous education and skills capacity in relevant areas. Indigenous peoples are rich in valuable knowledge, but are often lacking in the skills and levels of education necessary to themselves engage and participate in the various components of development programmes and projects that affect them in the modern world. Many State programmes which are oriented at improving the education of indigenous peoples should take into account such a perspective. The Special Rapporteur has made specific and detailed recommendations as to how such programmes should be consolidated and

strengthened in practice, in his reports regarding the situation of indigenous peoples in various countries. It should also be noted that the Expert Mechanism, in its first report to the Human Rights Council (A/HRC/10/56), offered important observations concerning the right of indigenous peoples to education, and United Nations agencies, including UNESCO, have likewise provided valuable input on this issue.

33. Beyond increasing indigenous peoples' educational opportunities in general, States and the international community play an important role in the promotion, training and capacity-building necessary to allow indigenous peoples to adequately understand, design and implement development activities within or affecting their communities, including in relation to large-scale natural resource extraction and infrastructure projects. While many development projects in various countries include programmes for some training and employment opportunities for affected indigenous communities, in most cases this training does not envision indigenous people as potential engineers, business administrators, environmental analysts, lawyers or other professionals with the skills necessary for the execution of the projects at the managerial level. Ensuring professional training for indigenous peoples that allows their full involvement in the design and delivery of development-related activities should be part of any vision for development as it concerns them.

34. Further, it is apparent from experiences worldwide that the capacity of indigenous peoples to successfully pursue their own development priorities requires the strengthening of their own institutions and self-government structures. This will empower them to take control of their own affairs in all aspects of their lives and to ensure that development processes are aligned with their own cultural patterns, values, customs and world views. In this regard, the Special Rapporteur echoes the statements of indigenous leaders around the world about the need for indigenous peoples themselves to continue to strengthen their own organizational and local governance capacities, in order to meet the challenges faced by their communities with respect to development, including complex decisions regarding natural resource extraction and other major development projects on their lands.

35. Related to capacity-building and the strengthening of self-government, indigenous peoples should be provided with the opportunity to participate as equal partners in the development process when both their particular interests and the interests of the larger societies of which they form a part are implicated. In his experience working together with State officials and representatives of private industry, the Special Rapporteur has observed, in general, a lack of consideration of options for indigenous peoples to be real partners in development activities. Real partnership would require indigenous peoples to be able to genuinely influence decisions concerning the development activities, fully participate in their design and implementation and directly benefit from any economic or other benefits that are derived from them.

36. The Special Rapporteur thus emphasizes that indigenous peoples must be allowed the opportunity to continue to progress and improve decision-making concerning development on their own terms, and to remedy any shortcomings through their own forms of internal regulation and accountability. States and other actors should take care to avoid conditioning their development assistance for indigenous communities on predetermined outcomes that are presumed by the outsiders to be the correct outcomes. In other words, indigenous peoples must be

allowed the opportunity to make mistakes, to learn from those mistakes and to build ever greater capacity and wisdom to advance in their own development objectives and choices about the future.

IV. The right to participation

37. The Expert Mechanism on the Rights of Indigenous Peoples is in the process of developing a report on one of the core issues concerning indigenous peoples — the right of indigenous peoples to participation in decision-making affecting them. Throughout his work, the Special Rapporteur has noticed a widespread lack of adequate implementation of this right and a need for orientation about the measures necessary to fulfil this right. The Expert Mechanism's study will be instrumental in providing guidance on this important issue and the Special Rapporteur commends the Expert Mechanism for the work that it already has under way as reflected in its progress report (A/HRC/EMRIP/2010/2).

38. As part of his ongoing coordination with the Expert Mechanism, and during a regional consultation in January 2010 in Chiang Mai, Thailand, organized by the Asia Indigenous Peoples Pact in collaboration with the Expert Mechanism and OHCHR, the Special Rapporteur provided input based on his experiences for the study on the right of indigenous peoples to participation in decision-making. Further, at the most recent session of the Expert Mechanism in Geneva in July 2010, the Special Rapporteur provided some further observations aimed at assisting the Expert Mechanism in its study, and he presents these observations to the General Assembly here.

A. General content and character

39. The right of indigenous peoples to participate in decision-making is both rooted in other basic human rights and essential to the effective enjoyment of those rights. A number of basic human rights principles underpin the right to participate and inform its content. These include, among others, principles of self-determination, equality, cultural integrity and property. Correspondingly, a lack of effective participation by indigenous peoples in decision-making concerning matters that affect them can have a direct impact on, and in many cases directly undermine, their effective enjoyment of other basic human rights, including those just mentioned as well as the rights to health and education.

40. As outlined by the Expert Mechanism in its recent progress report, the right to participation is present in a wide range of international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, as well as regional human rights instruments, including the American Convention on Human Rights. In particular, as highlighted in the Expert Mechanism's progress report, the United Nations Declaration on the Rights of

Indigenous Peoples contains more than 20 provisions affirming indigenous peoples' right to participate in decision-making on a wide range of matters.[2]

B. External and internal dimensions of the right to participation

41. Given the broad nature of the right to participate in decision-making, it is helpful to identify the normative framework for understanding this right in its various dimensions. In its progress report, the Expert Mechanism has identified and elaborated on both external and internal dimensions of the right to participation.

42. The Special Rapporteur sees three principal aspects of the dimension involving decision-making by actors that are external to indigenous communities and related concerns.

43. A first aspect of the external dimension has to do with the participation of indigenous peoples in the broader public life of the State, as promoted by article 5 of the Declaration, and is related to the right of all citizens to political participation. This aspect of participation in decision-making within spheres extending beyond indigenous communities is mostly, though not entirely, a matter of the rights of indigenous individuals. As affirmed in particular by the Inter-American Court of Human Rights in the case of *Yatama v. Nicaragua*, the right of indigenous peoples to participate in the broader public life of the State also includes a collective element, which requires States to enact special measures to ensure the effective participation of indigenous peoples within State political structures and institutions.[3]

44. A second aspect of the external dimension relates to the participation of indigenous peoples in decision-making by State actors about measures that affect indigenous peoples' rights or interests in particular, beyond those rights or interests shared by the people of the State generally. In this regard, article 18 of the Declaration states that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights". This right includes a corollary duty of States to consult with indigenous peoples in matters that affect their rights and interests in order to obtain their free, prior and informed consent as recognized, especially, by article 19 of the Declaration. The Special Rapporteur devoted his second annual report to the Human Rights Council to the issue of the duty of States to consult with indigenous peoples (A/HRC/12/34), and has continued to address this issue in various aspects of his work.

45. A third aspect of the external dimension of the right of participation is the involvement of indigenous peoples in decision-making in the international arena. This aspect is often overlooked, but remains an important component of indigenous peoples' right to self-determination. Indigenous peoples have achieved historic accomplishments at the international level, including in the processes leading to the adoption of the Declaration in 2007 and to the establishment of the three United Nations mechanisms with specific mandates concerning indigenous issues. Indigenous peoples have a greater voice at the international level than ever before. Still, much remains to be done to continue to encourage and allow for the active involvement of indigenous peoples in the development of international standards

[3] A/HRC/EMRIP/2010/2, para. 8, arts. 3-5, 10-12, 14, 15, 17-19, 22, 23, 26-28, 30-32, 36, 38, 40.

and programmes that concern them, including within the United Nations and other international and regional institutions.

46. Apart from its external aspects, the internal dimension of the right to participation in decision-making relates to indigenous peoples' exercise of autonomy and self-government, and to maintaining their own legal and justice systems. This dimension of the right includes a corresponding duty of the State to allow indigenous peoples to make their own decisions concerning their internal matters, and to respect those decisions. In this regard the Declaration recognizes in article 4 the right of indigenous peoples to "autonomy or self-government in matters relating to their internal and local affairs". It is apparent from experiences worldwide that the effective exercise of the right to autonomy and self-government will require a strengthening of indigenous peoples' institutions and self-government structures, in order that they may genuinely take control of their own affairs in all aspects of their lives and to ensure that matters affecting them are aligned with their own cultural patterns, values, customs and world-views.

C. Practical implementation of the right

47. Beyond identifying the normative framework for understanding the right of participation in its various dimensions, it is important to develop workable strategies for implementation of the right. To that end it is useful to take stock of the problems indigenous peoples are facing in exercising the right to participation in its various dimensions, as well as to identify good practices and lessons learned. The Special Rapporteur offers here a few examples of these, which he has encountered in his work. More detailed relevant observations and specific recommendations are included in various of his reports concerning country situations and cases of alleged human rights violations.

48. Regarding the first aspect of external participation, through his work the Special Rapporteur has observed that the participation of indigenous peoples in the broader public life of the State is inadequate and generally not proportional in relation to their populations in most countries where indigenous peoples live. Nevertheless, there are numerous examples of efforts by States to increase indigenous political participation through targeted measures such as guaranteed seats in legislative bodies, redistricting and the creation of special indigenous advisory bodies. Still, continued steps need to be taken to ensure greater indigenous participation in the process of defining State policy and administering Government programmes so that the voices of indigenous peoples and individuals will at all times be heard at all levels of public and political decision-making. The Special Rapporteur has explored several examples of problems encountered and solutions advanced in this connection in his reports examining the situations of indigenous peoples in different countries.

49. With respect to the participation of indigenous peoples in decision-making about measures that specifically affect their rights or interests — the third aspect of the right — it is evident that adequate consultation mechanisms are lacking throughout the world and that, in particular, indigenous peoples do not adequately control their territories in many cases, even when lands are demarcated and registered. The Special Rapporteur has observed numerous cases in which indigenous peoples are not provided sufficient opportunity to participate in decision-

making concerning natural resource extraction activities taking place within their traditional lands. Given the pervasiveness of this problem in countries throughout the world, the thematic section of the Special Rapporteur's 2010 annual report to the Human Rights Council (A/HRC/15/37) is dedicated to examining issues related to extractive industries operating in indigenous territories.

50. Furthermore, in nearly all of the countries he has visited, the Special Rapporteur has heard reports of a lack of adequate participation of indigenous peoples in the design, delivery and monitoring of programmes and policies that specifically affect them, at all levels. The Special Rapporteur would like to stress that enhancing indigenous peoples' control over decision-making that affects them has been shown to be conducive to successful practical outcomes, and there are numerous examples of successful indigenous-controlled programmes in place to address issues of indigenous health, education and other areas of concern, in ways that are culturally appropriate and adapted to local needs. Measures should be taken to support these programmes and increase the opportunity for indigenous peoples to provide services to their own communities.

51. Regarding the third aspect of external participation, participation at the international level, the Special Rapporteur notes that there is strong participation of indigenous peoples at the sessions of the Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples. Furthermore, over the past two years the Special Rapporteur has observed increased interaction by indigenous peoples with his mandate and notes a heightened engagement by indigenous groups with all the relevant international mechanisms. The formation of the Inter-Agency Support Group on Indigenous Issues is an example of an initiative for strengthening cooperation among United Nations agencies and mainstreaming indigenous issues within the United Nations system, which could also provide an important forum for indigenous peoples' participation at the international level.

52. At the same time, indigenous peoples continue to face impediments to their active participation at the international level, such that there is still a lack of adequate participation of indigenous peoples in conferences and meetings where matters of vital importance to them — such as the environment and traditional knowledge — are being discussed and decided. Additionally, indigenous peoples often are excluded from or have inadequate participation in decision-making by international financial institutions about large-scale development projects that affect them. Potential reforms within international institutions and platforms of decision-making that affect indigenous peoples' lives should be closely examined; certainly, there is room to strengthen education and capacity-building of indigenous peoples in this regard. Financial and administrative support should be maintained and expanded as necessary to ensure that indigenous peoples can participate effectively in international forums.

53. Finally, with respect to indigenous decision-making concerning internal matters, while there are some noteworthy examples of indigenous autonomy and self-government throughout the world, continued efforts by States are needed to promote and consolidate legal recognition and accommodation of indigenous institutions of self-governance. Additionally, there is a need for indigenous peoples themselves to continue to endeavour to strengthen their capacities to control and manage their own affairs and to participate effectively in all decisions affecting them, in a spirit of cooperation and partnership with government authorities at all

levels, as well as a need to address any issues of social dysfunction within their communities.

V. Further comments on the Declaration on the Rights of Indigenous Peoples

54. As noted in the Special Rapporteur's first report to the General Assembly, the Declaration on the Rights of Indigenous Peoples is now the principal instrument of the United Nations system for measuring the human rights conditions of indigenous peoples around the world and identifying action needed to address those conditions. The resolution reauthorizing the mandate of the Special Rapporteur specifically directs the Special Rapporteur to promote the Declaration as a key aspect of his mandate (Human Rights Council resolution 6/12, para. 1(g)).

A. Moving beyond formal endorsement of the Declaration

55. The Special Rapporteur has on various occasions, including in his first report to the General Assembly (A/64/338) and his first report to the Human Rights Council (A/HRC/9/9), offered comments on the Declaration on the Rights of Indigenous Peoples. Additionally, the Special Rapporteur continually draws the attention of States to the standards provided in the Declaration in his country reports and his analysis of specific situations and concerns. At recent sessions of the Expert Mechanism and the Permanent Forum, the Special Rapporteur offered further views on the Declaration in the light of the programmes of each of these bodies. The present observations expand on some of the views the Special Rapporteur has expressed in the past regarding the Declaration, focusing on recent developments, matters of ongoing concern, and in particular on the need for decided and concerted action for its implementation.

56. Since the adoption of the Declaration in 2007, the very few States that voted against the Declaration have changed or are in the process of reassessing their positions, as noted in paragraphs 12 and 13 above. Furthermore, Colombia and Samoa, two of the States that abstained in the vote on the Declaration, made public statements last year expressing their commitment to the principles expressed in the instrument. The expressions of all these countries undoubtedly contribute to the further strengthening of the international commitment to advancing the rights of indigenous peoples that the Declaration represents.

57. While strengthening of support for the Declaration is to be celebrated, it is all too apparent that a great deal remains to be done to see the objectives of the Declaration become a reality in the everyday lives of the indigenous peoples of the world. Today, the Declaration serves more as a reminder of how far there is to go in bringing justice and dignity to the lives of indigenous peoples than a reflection of what has actually been achieved on the ground. Indeed, historical patterns of oppression continue to manifest themselves in ongoing barriers to the full enjoyment of human rights by indigenous peoples. It is feared that the wide gap between the Declaration and its effective implementation will persist, leading to a certain complacency and acceptance of that condition by dominant actors and within the United Nations system. This cannot be allowed to happen.

58. The Declaration provides a detailed list of norms that constitute the minimum standards for the survival, dignity and well-being of indigenous peoples around the world (article 43). As the Special Rapporteur has observed previously, the Declaration does not affirm or create special rights that are unique to indigenous peoples in a fundamental sense, but rather it elaborates upon fundamental human rights of universal application in the specific cultural, historical, social and economic circumstances of indigenous peoples. Thus, implementation by States simply requires a commitment to upholding the basic standards of human rights, taking into account the specific circumstances of indigenous peoples and the collective dimensions of the exercise of those rights by them. Undoubtedly the adoption of the Declaration by the General Assembly was a momentous event, and recent statements of formal support for the Declaration are to be welcomed. But these achievements cannot be seen as the final or principal goals. Rather, it is the faithful implementation of these rights that must be the focus of concerted attention.

B. The need for a commitment to the Declaration that is not obscured by references to its character as a non-legally binding instrument

59. A starting point for the effective implementation of the Declaration is a firm commitment by States and the United Nations system to its rights and principles that is free from vague assertions that the Declaration is not obligatory. On too many occasions State and other actors attempt to diminish the normative weight of the Declaration by describing it as an instrument that is not "legally binding". As a resolution of the General Assembly, the Declaration by its nature is not, in and of itself, a legally binding instrument, given the authority of the General Assembly under the Charter of the United Nations only to make "recommendations", except in regard to membership, budgetary and administrative matters. But understanding the normative significance and legal obligations related to the Declaration does not end there.

60. First, whatever its legal significance, the Declaration has a significant normative weight grounded in its high degree of legitimacy. This legitimacy is a function not only of the fact that it has been formally endorsed by an overwhelming majority of United Nations Member States, but also the fact that it is the product of years of advocacy and struggle by indigenous peoples themselves. The Declaration is the result of a cross-cultural dialogue that took place over decades, in which indigenous peoples took a leading role. The norms of the Declaration substantially reflect indigenous peoples' own aspirations, which after years of deliberation have come to be accepted by the international community.

61. The Declaration's wording, which has been endorsed by Members States, explicitly manifests a commitment to the rights and principles the Declaration embodies. It is simply a matter of good faith that States adhere to that expression of commitment to the norms that indigenous peoples themselves have advanced.

62. Furthermore, even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the Charter, other treaty commitments and customary international law. The Declaration builds upon the general human rights obligations of States under the Charter and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity that are incorporated

into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies. In addition, core principles of the Declaration can be seen to be generally accepted within international and State practice, and hence to that extent the Declaration reflects customary international law.

63. In sum, the significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character. Implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification.

C. Minimum practical steps towards implementation

64. The Special Rapporteur offers here a few comments on minimum steps that he considers to be required to move forward with implementation of the Declaration beyond its formal endorsement by States.

65. First, State officials as well as indigenous leaders should receive training on the Declaration and the related international instruments, and on practical measures to implement the Declaration. Along with this training, seminars and conferences should be organized at national and local levels to bring together State officials and indigenous leaders to develop strategies and initiatives for implementation, including measures to address historical grievances, in the spirit of cooperation and reconciliation that the Declaration represents.

66. Additionally, States should engage in comprehensive reviews of their existing legislation and administrative programmes to identify where they may be incompatible with the Declaration. This would include a review of all laws and programmes touching upon indigenous peoples' rights and interests, including those related to natural resource development, land, education, administration of justice and other areas. On the basis of such a review, the necessary legal and programmatic reforms should be developed and implemented in consultation with indigenous peoples.

67. States should be committed to devoting significant human and financial resources to the measures required to implement the Declaration. These resources will typically be required for the demarcation or return of indigenous lands, the development of culturally appropriate educational programmes, support for indigenous self-governance institutions and the many other measures contemplated by the Declaration.

68. The United Nations system and the international community should develop and implement programmes to provide technical and financial assistance to States and indigenous peoples to move forward with these and related steps to implement the Declaration, as a matter of utmost priority. In some instances existing United Nations and international cooperation programmes may have to be reformed to align with the goals and objectives of the Declaration.

69. To varying degrees these minimum steps to implement the Declaration are already being undertaken by some States and in some cases with the backing of United Nations agencies or international cooperation programmes. It is important that such initiatives take root much more broadly, and that experiences are shared to strengthen these initiatives.

VI. Conclusions and recommendations

70. **The Special Rapporteur offers the following conclusions and recommendations on the basis of his examination of the substantive issues discussed above, including his examination of these issues through the various aspects of his work, as reflected in his several reports to the Human Rights Council to date.**

A. Development with identity and culture

71. **The right to development is a right of all peoples, including indigenous peoples. In the light of the extreme disadvantages that indigenous peoples have typically faced across a range of social and economic indicators, there are particular concerns relating to indigenous peoples that must be taken into account with regard to development initiatives that affect them.**

72. **There are two broad areas of concern that can be identified when considering development programmes affecting indigenous peoples. The first area of concern relates to policies and initiatives aimed at the development of the economy or infrastructure of the State generally and that are said to benefit the people of the State as a whole, but that have actual or potential negative effects on indigenous peoples. These include, inter alia, development programmes involving the extraction of natural resources and mega-projects such as the construction of dams and transportation facilities on indigenous peoples' territories. Such development programmes and projects, despite their specific effects on indigenous peoples and their territories, are often undertaken without adequate consultation with them or without their free, prior and informed consent.**

73. **The second area of concern relates to development initiatives targeted specifically at reducing the disadvantages experienced by indigenous peoples and improving their social and economic well-being. These initiatives all too often fail to properly incorporate indigenous peoples in the design and delivery of the programmes in a way that advances their self-determination and their rights to maintain their distinct cultural identities, languages and connections with their traditional lands.**

74. **Within both of these areas of concern, there is a need for Governments to decidedly fold into development programmes the goal of increasing indigenous self-determination. Enhancing indigenous self-determination is a matter of basic human dignity as well as being conducive to successful practical outcomes. Among the objectives to be pursued in this regard are the following:**

(a) **Enhancing indigenous education and skills in relevant areas so that indigenous peoples themselves can engage and participate in the various components of development programmes and projects that affect them in the modern world, including natural resource extraction projects;**

(b) **Strengthening indigenous peoples' own institutions and self-government structures to empower them to take control of their own affairs in all aspects of their lives and to ensure that development processes are aligned with their own cultural patterns, values, customs and world-views;**

(c) Providing indigenous peoples with the opportunity to participate as equal partners in the development process when both their particular interests and the interests of the larger societies of which they form a part are implicated, allowing them to genuinely influence decisions concerning development activities, fully participate in their design and implementation and directly benefit from any economic or other benefits that are derived from them;

(d) Allowing indigenous peoples the opportunity to continue to progress and improve decision-making concerning development on their own terms, and to remedy any shortcomings through their own forms of internal regulation and accountability. In this regard, indigenous peoples should be allowed the opportunity to make mistakes, to learn from those mistakes and to build ever-greater capacity and wisdom to advance in their own development objectives and choices about the future.

B. The right to participation

75. In the present report, the Special Rapporteur offers some initial observations on the right to participation for indigenous peoples, focusing on identifying a normative framework for understanding this right. He will continue to address this issue and provide further observations on the practical implementation of this right in future reports.

76. Participation in decision-making is a foundational right that at its core provides the basis for the enjoyment of the full range of human rights. Furthermore, a number of basic human rights principles underpin the right to participation and inform its content, including, among others, principles of self-determination, equality, cultural integrity and property. In understanding the right to participation in the context of indigenous peoples, it is useful to distinguish between the external and internal dimensions of the right.

77. The Special Rapporteur sees three principal aspects of the external dimension. A first aspect has to do with the participation of indigenous peoples in the broader public or political life of the State. Almost invariably, the participation of indigenous peoples in the broader public life of the State is inadequate and not proportional in relation to indigenous populations. While there are numerous examples of efforts by States to increase indigenous political participation through various measures, continued steps need to be taken to ensure greater indigenous participation in the public sphere. In this regard, special measures may be required to ensure that indigenous peoples can participate on equal footing in the public and political life of States.

78. A second aspect of the external dimension relates to the right of indigenous peoples to participate in decision-making about measures that affect their rights or interests in particular. This aspect corresponds to the duty of States to consult with indigenous peoples in matters that affect their rights and interests, in order to obtain their free, prior and informed consent.

79. In his reports, the Special Rapporteur has provided numerous observations and recommendations regarding specific examples of problems related to the implementation of this second aspect of the external dimension of

participation. In many cases, the Special Rapporteur has observed a lack of adequate participation of indigenous peoples in the design, delivery and monitoring of programmes, policies and projects that affect them, at all levels. Moreover, it is evident that throughout the world, indigenous peoples are not adequately consulted, nor is their consent obtained, when decisions affecting their rights or interests are made.

80. A third aspect of the external dimension of the right to participation is the involvement of indigenous peoples in decision-making in the international arena. Although indigenous peoples have achieved historic accomplishments at the international level, continued efforts need to be made to ensure the active involvement of indigenous peoples in the development of all international standards and programmes that concern them. Potential reforms within international institutions and platforms of decision-making that affect indigenous peoples' lives should be closely examined, and measures should be taken or strengthened to provide financial and other support to enable indigenous peoples to participate effectively at the international level.

81. The internal dimension of the right to participation relates to indigenous peoples' exercise of autonomy or self-government. This dimension of the right includes a corresponding duty of the State to allow indigenous peoples to make their own decisions concerning their internal matters, and to respect those decisions. States should make continued efforts to promote and consolidate legal recognition and accommodation of indigenous institutions of self-governance, in order for indigenous peoples genuinely to take control of their own affairs in all aspects of their lives and to ensure that matters affecting them are aligned with their own cultural patterns, values, customs and world-views.

82. Additionally, indigenous peoples themselves must continue to endeavour to strengthen their capacities to control and manage their own affairs and to participate effectively in all decisions affecting them, in a spirit of cooperation and partnership with government authorities at all levels.

C. Further comments on the Declaration on the Rights of Indigenous Peoples

83. Adoption of the Declaration on the Rights of Indigenous Peoples by the General Assembly was a momentous event, and recent statements of formal support, or movement towards support, by the few States that originally voted against its adoption are to be welcomed. But these achievements cannot be seen as the final or principal goals. Rather, it is the faithful implementation of these rights that must be the focus of concerted attention.

84. It is all too apparent that a great deal remains to be done to see the objectives of the Declaration become a reality in the everyday lives of the indigenous peoples of the world. Today, the Declaration serves more as a reminder of how far there is to go in bringing justice and dignity to the lives of indigenous peoples than a reflection of what has actually been achieved on the ground.

85. Implementation of the Declaration should be regarded as a political, moral and legal imperative without qualification, within the framework of the

human rights objectives of the Charter of the United Nations. The significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character.

86. **The Declaration has a significant normative weight grounded in its high degree of legitimacy. This legitimacy is a function of not only the fact that it has been formally endorsed by an overwhelming majority of United Nations Member States, but also the fact that it is the product of years of advocacy and struggle by indigenous peoples themselves.**

87. **Furthermore, the Declaration builds upon fundamental human rights and principles, such as non-discrimination, self-determination and cultural integrity, which are incorporated into widely ratified human rights treaties. In addition, core principles of the Declaration can be seen to be generally accepted within international and State practice, and hence to that extent the Declaration reflects customary international law.**

88. **Certain minimum steps are required to implement the Declaration, as outlined in paragraphs 12 and 13 above. To varying degrees, these minimum steps to implement the Declaration are already being taken by some States and in some cases with the backing of United Nations agencies or international cooperation programmes. It is important that such initiatives take root much more broadly, and that experiences are shared to strengthen these initiatives.**